Office-Supreme Court, U.S.
FILED
SEP 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARSHALL FIELD & COMPANY,

Petitioner,

vs.

GEORGENE PASKULY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

JUDSON H. MINER
14 West Erie Street
Chicago, Illinois 60610
Counsel for Respondent

Of Counsel:
DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, Illinois 60611
(312) 751-1170

Pandick Press Midwest, Inc., Chicago • 454-7600

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
A. The Decision Below Is Consistent With All Existing Title VII Case Law	3
B. The Seventh Circuit Properly Applied Rule 15(c), Federal Rules of Civil Procedure	4
1. On Its Face, Rule 15(c) Supports the Seventh Circuit's Ruling	7
2. The Treatises Support the Seventh Circuit's Ruling	10
3. The Seventh Circuit's Ruling Is Consistent With the Case Law	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

PAGE

Albermarle Paper Co. v. *Moody*, 422 U. S. 405 (1975) 8

American Pipe and Construction Co. v. *Utah*, 414 U. S. 538 (1974) 6, 9

Appleton Elec. v. *Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980) 9

Arneil v. *Ramsey*, 550 F.2d 774 (2nd Cir. 1977) 11

Badillo v. *Central Steel & Wire Co.*, 495 F. Supp. 299 (N. D. Ill. 1980) 4, 9, 10

Bernstein v. *National Liberty International Corp.*, 407 F. Supp. 709 (E. D. Pa. 1976) 4, 10

Franks v. *Bowman Transp. Co., Inc.*, 424 U. S. 747 (1976) 8

Harshaw v. *Pan American World Airlines*, 12 FEP Cases 1353 (D. D. C. 1975) 4, 10

Hockett v. *American Airlines, Inc.*, 357 F. Supp. 1343 (N. D. Ill. 1973) 10

Ingram v. *Kumar*, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U. S. 940 (1979) 9

Mays v. *Motorola*, 12 EPD ¶ 11,027 (N.D. Ill. 1976); 14 EPD ¶ 7676 (N.D. Ill. 1977) 4

McDonnell Douglas Corp. v. *Green*, 411 U. S. 792 (1973) 9

Moore Company v. *Sid Richardson Carbon & Gasoline Company*, 347 F.2d 921 (8th Cir.), *cert. denied*, 383 U. S. 925 (1965) 9

Nance v. *Union Carbide Corp.*, 540 F.2d 719 (4th Cir. 1976) 4

Order of Railroad Telegraphers v. *Railway Express Agency*, 342 U. S. 324 (1944) 6

Perry v. *Beneficial Finance Co. of New York, Inc.*, 81 F. R. D. 490 (W.D. N.Y. 1979) 10

	PAGE
Rajender v. *University of Minnesota*, 20 EPD ¶ 30,214 (D. Minn. 1978)	4
Sanchez v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970)	8
Silverman v. *Lehigh University*, 19 FEP Cases 983 (E. D. Pa. 1976)	4, 10
Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians v. *United States*, 372 F.2d 951 (Ct. Cl. 1967)	10
Staren v. *American National Bank and Trust Company of Chicago*, 529 F.2d 1257 (7th Cir. 1976)	6
United States v. *Wahl*, 583 F.2d 285 (6th Cir. 1978)	9
Williams v. *United States*, 405 F.2d 234 (5th Cir. 1968)	10
Windbrooke Dev. Corp. v. *Environment Entr., Inc., Fla.*, 524 F.2d 461 (5th Cir. 1975)	9
Statutes and Federal Rules	
Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e et seq.	1, 2, 3, 4, 8, 9
Federal Rules of Civil Procedure	
Rule 3	9
Rule 15(c)	1, 4, 5, 6, 7, 8, 10
Rule 23	2, 3
Miscellaneous	
Advisory Committee's Notes, 39 F. R. D. 82	8
2 Moore's *Federal Practice* ¶ 3.07[5]	9
Wright & Miller, *Federal Practice and Procedure: Civil* ¶ 1501	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARSHALL FIELD & COMPANY,

Petitioner,

vs.

GEORGENE PASKULY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Petitioner Marshall Field & Company (Field) asks this Court to reconsider a decision of the Seventh Circuit which held that the plaintiff in a Title VII lawsuit could amend her timely complaint to include a class allegation more than ninety days after receipt of a right-to-sue letter from the Equal Employment Opportunity Commission. In a *per curiam* opinion, the Seventh Circuit held that since the claims of the class arose from the same employment practices from which her individual claim arose, the "amended pleading . . . 'relates back' to the date of the original pleading under Rule 15(c) of the Federal Rules of Civil Procedure . . ." (Appendix 2a). That decision squares with the existing case law and is mandated by Rule 15(c). Before discussing the factors which make *certiorari* inappropriate, it is necessary to set forth certain facts overlooked by petitioner.

STATEMENT OF THE CASE

Ms. Georgene Paskuly filed a Title VII lawsuit on June 23, 1978 (A-9),[1] well within the ninety day filing period. In all but form, the initial complaint was a class complaint. Although plaintiff did not plead the formal requirements of Rule 23, F. R. Civ. P., and did not explicitly request class-wide relief, her first complaint repeatedly alleged patterns and practices of discrimination that adversely affected women as a class. For example, Paragraph 10 of her original complaint states (A-11, 12):

> Defendant has established a promotional and transfer system which has the effect of continuing and preserving the *defendant's policy, practice, custom and usage of limiting the employment and promotional opportunities of female employees because of their sex.* These discriminatory practices include, but are not limited to, the following:
>
> A. Maintaining job classifications segregated on the basis of sex;
>
> B. Failing and refusing to transfer and promote plaintiff *and other qualified female employees* because of their sex;
>
> C. Maintaining policies and practices with respect, but not limited to, wages, job assignments and other terms and conditions of employment which unlawfully operate to deny equal opportunities to plaintiff *and other females* because of their sex;
>
> D. Maintaining policies and practices which utilize subjective, non-job related promotional and transfer criteria, which criteria operate and disparate and adversely affect plaintiff *and other females* because of their sex;
>
> E. Failing and refusing to pay plaintiff *and other females* on an equal basis with men for substantially equal work;

---

[1] Factual references are to the Appendix filed with the Seventh Circuit or to the record.

> F. Failing and refusing to provide training for plaintiff *and other females* because of their sex for positions for which sex is not a bona fide occupational qualification;
>
> G. Failing and refusing to take affirmative action to correct the effects of discriminatory policies and practices complained of herein. (Emphasis added.)

Paragraph 11 reiterates the class-wide scope of plaintiff's claims (A-12):

> The effect of the policies and practices complained of in paragraph ten (10) above, has been to deprive plaintiff *and other females* of equal employment opportunities and otherwise adversely to affect *their* status as employees because of *their* sex. (Emphasis added.)

Four months later, plaintiff's lawyer initiated a typical first wave of discovery (R-12) which was answered in January, 1979 (R-18). Shortly thereafter, plaintiff's counsel withdrew and discovery was stayed.

In the summer of 1979, new counsel was retained. After reviewing the EEOC charge, the pleadings and the initial discovery, plaintiff's new counsel sought and received permission to file an amended complaint and a motion for class certification. In October, 1979, plaintiff filed her Amended Complaint (A-17). The Amended Complaint set forth the identical substantive allegations. It differed from its predecessor in only two respects: it pleaded the requirements of Rule 23 and it added a request for class relief.

REASONS FOR DENYING THE WRIT

A.

The Decision Below Is Consistent With All Existing Title VII Case Law.

As petitioner correctly observes, "[t]he factual circumstances of the case are hardly unique. Indeed, they present a recurring situation, especially in Title VII lawsuits. Often, after

expiration of the ninety day limitations period, a Title VII plaintiff seeks to transform his or her lawsuit into a class action" (Petition, 12). What petitioner does not disclose is that the courts have routinely allowed plaintiffs in Title VII lawsuits to amend their complaints and add class allegations after the expiration of the ninety day filing period. See, *e. g., Badillo* v. *Central Steel & Wire Co.*, 495 F. Supp. 299 (N.D. Ill. 1980); *Rajender* v. *University of Minnesota*, 20 EPD ¶ 30,214 at 12,151 (D.Minn. 1978); *Bernstein* v. *National Liberty International Corp.*, 407 F. Supp. 207, 714 (E.D.Pa. 1976); *Silverman* v. *Lehigh University*, 19 FEP Cases 983, 984-85 (E.D.Pa. 1976); *Mays* v. *Motorola*, 12 EPD ¶ 11,027 (N.D. Ill. 1976); 14 EPD ¶ 7676 (N.D. Ill. 1977); *Harshaw* v. *Pan American World Airlines*, 12 FEP Cases 1353 (D.D.C. 1975).[2] To date, petitioner has failed to cite a single Title VII opinion reaching a contrary result.

B.

The Seventh Circuit Properly Applied Rule 15(c), Federal Rules of Civil Procedure.

The Seventh Circuit held that plaintiff's amended complaint adding a class allegation related back to the date of the original pleading under Rule 15(c)[3] because "the claims of the class arose from the same employment practices" set forth in the original pleading.

---

[2] Also, in *Nance* v. *Union Carbide Corp.*, 540 F.2d 719, 725 (4th Cir. 1976), the Court reversed an award of class relief because the plaintiff had failed to amend the complaint to add class allegations either before or during trial. It logically follows that the Fourth Circuit thought that these plaintiffs could have amended their Title VII lawsuit long after the ninety day filing period expired.

[3] Rule 15(c) reads:

Relation Back of Amendments. Whenever the claim or defense

(footnote continued on following page)

In challenging that ruling, petitioner contends that the Seventh Circuit improperly applied the "relation back" doctrine of Rule 15(c) of the Federal Rules of Civil Procedure. According to petitioner, Rule 15(c) mandates the fulfillment of three prerequisites before an amendment adding a class allegation can relate back to the date of the initial filing, namely:

> (a) that the claims alleged in the amended complaint arose out of the same occurrence set forth in the original pleadings;
>
> (b) that within the period provided by law for commencing the action, the defendant must receive such notice of the institution of the action that he will suffer no prejudice in defending on the merits; and
>
> (c) that within the period provided by law for commencing the action, the defendant knew or should have known that, but for a mistake concerning the identity of the proper parties, those parties would have been named in the original complaint.

Petitioner argues that the Seventh Circuit "ignored completely the 'mistake' requirement" and the requirement that it receive " 'Notice of the institution of the acts' within the limitation period" (Petition, 10). The error in petitioner's analysis is that

---

(footnote continued from previous page)

> asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

the latter two prerequisites do not apply to amendments to add plaintiffs to a pending lawsuit.

The test for determining whether an amendment that adds a class allegation or a new plaintiff after the statute of limitations has run should relate back under Rule 15(c) is the one applied by the Seventh Circuit, namely, does the underlying "claim. . . . arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." The standard for applying the rule is that "amendments pursuant to Rule 15(c) should be freely allowed." *Staren* v. *American National Bank and Trust Company of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976). The touchstone is notice because statutes of limitations are designed to protect parties from unfair surprises through the revival of stale claims after evidence has been lost, memories have faded or witnesses have disappeared. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 348-49 (1944). Thus a party who has notice of litigation concerning a given transaction or occurrence and is preparing to defend the action against him has been extended all of the protection statutes of limitations afford.[4]

---

[4] Petitioner contends that notice of the substantive claims is not sufficient notice within the meaning of Rule 15(c). Instead, petitioner argues that it is also entitled to notice of the number and generic identity of all potential plaintiffs. It claims to find support for its position in this Court's decision in *American Pipe and Construction Co.* v. *Utah*, 414 U. S. 538 (1974).

There are two answers to petitioner's claim. First, petitioner's reliance on *American Pipe* is misplaced. *American Pipe* did not involve Rule 15(c) at all. The issue in that case was whether the filing of a class action tolled the statute of limitations. This Court held that it did because the class complaint provided defendant with notice of both the substantive claims and "generic identities of potential plaintiffs". However, the fact that notice of the substantive claims and the generic identity of potential plaintiffs was found by this Court in *American Pipe* to satisfy the statute of limitations does not support petitioner's argument that nothing else will. Second, even if its

(footnote continued on following page)

1. On Its Face, Rule 15(c) Supports the Seventh Circuit's Ruling.

Rule 15(c) provides,

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Generally, when an amendment arises out of the same conduct as the original complaint, notice of the original litigation affords the defendant sufficient protection. But it does not always do so. And the case in which it may not is when a new defendant is added by amendment. The new defendant may well be unjustly surprised and prejudiced by its tardy inclusion in a lawsuit about which it had no prior knowledge. If the new defendant was unaware of the existence of a lawsuit, it may have misplaced evidence or lost touch with important witnesses. The fact that the amended complaint grew out of the same transaction or occurrence would be no protection to that defendant. Thus, the second sentence of Rule 15(c) includes two specific prerequisites to protect defendants by making sure that they had notice of the original complaint and were not prejudiced in preparing their defense. These prerequisites apply to amendments "changing the party *against* whom a claim is asserted" (emphasis added).

Essential to petitioner's position is a reading of Rule 15(c) that applies the second sentence equally to amendments adding plaintiffs. However, no court has ever held that the Rule applies equally to amendments adding plaintiffs. It is not surprising, therefore, that in support of its contention that "[i]t

---

(footnote continued from previous page)

reliance on *American Pipe* is correct, the broad substantive allegations in the original complaint in this case afforded this defendant with sufficient notice of the "generic identity of all potential plaintiffs".

is . . . well established law in other circuits that all the criteria of Rule 15(c) must be satisfied where a new party is brought into a lawsuit", petitioner cites only cases that apply Rule 15(c) to amendments adding defendants. (See all cases cited in Petition, 9-10).

Indeed, the Advisory Committee explains that the Rule is not intended to be equally applicable to amendments changing plaintiffs. According to the Advisory Committee (39 F. R. D. at 83-84):

> The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since *the problem is generally easier.* Again, the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants *extends by analogy to amendments changing plaintiffs.* (Emphasis added.)

The relation back of amendments adding plaintiffs is easier because it does not pose the same dangers. If the amendment adding new plaintiffs arises out of the same occurrence it causes no unfair surprise. The defendant has notice of the lawsuit, indeed the defendant is already in court. Nor does an amendment adding plaintiffs present the problems of lost evidence, faded memories or absent witnesses. The defendant is already preparing to defend the action against him.

This is particularly so in Title VII cases. First, with the filing of the charge, a defendant knows that it could be sued on behalf of class members who had not satisfied any of Title VII's procedural prerequisites. *Franks* v. *Bowman Transp. Co., Inc.,* 424 U. S. 747, 771 (1976); *Albermarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 n.8 (1975). Defendant also knows that the scope of the complaint could extend beyond the factual allegations of the charge, to encompass like and related kinds of discrimination that might reasonably have been within the scope of an EEOC investigation growing out of the charge. *Sanchez* v. *Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970).

Second, even if a Title VII suit was not brought as a class action, defendant knows that evidence of class-wide discrimination remains probative. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 804-05 (1973). Indeed, defendant knows that even under Ms. Paskuly's original complaint, it would have had to defend against the same allegations of a broad pattern of discrimination against its female employees.

For these reasons, all of the protections intended by Rule 15(c) toward new defendants do not require a literal application of the Rule to amendments charging plaintiffs. Indeed, a literal application is impossible. For example, the problem of "mistaken identity" dealt with in the second sentence of the Rule can apply only to amendments adding Defendants.[5]

Thus, both the language of Rule 15(c) and the Advisory Committee's Notes interpreting the Rule support the Seventh

---

[5] Petitioner's notice argument is another example of why the second sentence of Rule 15(c) cannot be applied literally. According to petitioner, Ms. Paskuly's timely complaint was not served by the Federal Marshal within the limitation period. Thus, relying on the literal language of the second sentence of Rule 15(c), petitioner claims that it did not have notice "within the period provided by law for commencing the action".

However, Rule 3, F. R. Civ. P., provides that "[a] civil action is commenced by filing a complaint with the court." And, according to Professor Moore, "the federal courts have consistently held that commencement of an action in compliance with Rule 3 is sufficient to toll a federal statute of limitations." 2 Moore's *Federal Practice* ¶ 3.07[5] at 3-122. See, *American Pipe and Construction Co.* v. *Utah*, 414 U. S. 538 (1974). See also, *Moore Company* v. *Sid Richardson Carbon & Gasoline Company*, 347 F. 2d 921 (8th Cir.), *cert. denied*, 383 U. S. 925 (1965); *Badillo* v. *Central Steel & Wire Co.*, 495 F. Supp. 299 (N. D. Ill. 1980). Thus, Ms. Paskuly's timely complaint tolled the statute of limitations. Defendant Marshall Field received timely notice regardless of when they were actually served. The cases petitioner cites involved amendments adding defendants and thus fall within the literal language of the Rule. See, *Appleton Elec.* v. *Graves Truck Line, Inc.*, 635 F.2d 603, 608 (7th Cir. 1980). See also, *Ingram* v. *Kumar*, 585 F.2d 566, 571 n. 10 (2d Cir. 1978); *United States* v. *Wahl*, 583 F.2d 285 (6th Cir. 1978); *Windbrooke Dev. Corp.* v. *Environment Entr., Inc.*, 524 F.2d 461 (5th Cir. 1975).

Circuit's holding that plaintiff's amendment adding the class allegations relates back because it arose from the same facts or occurrences as the original pleading.

2. The Treatises Support the Seventh Circuit's Ruling.

The treatises interpreting Rule 15(c) support the Seventh Circuit's application of the Rule. As Professors Wright and Miller explain, *Federal Practice and Procedure: Civil* § 1501 at 524:

> As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense.

3. The Seventh Circuit's Ruling Is Consistent With the Case Law.

The case law is virtually uniform in its support of the Seventh Circuit's holding that an amendment adding new parties as plaintiffs relates back if it arises out of the same transaction or occurrence. See, *e.g.*, *Williams* v. *United States*, 405 F.2d 234, 237-39 (5th Cir. 1968); *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians* v. *United States*, 372 F.2d 951, 961 (Ct. Cl. 1967); *Hockett* v. *American Airlines, Inc.*, 357 F. Supp. 1343, 1348 (N.D. Ill. 1973); *Bernstein* v. *National Liberty International Corp., supra; Badillo* v. *Central Steel & Wire Co., supra; Harshaw* v. *Pan American World Airlines, supra; Silverman* v. *Lehigh University, supra.* But see, *Perry* v. *Beneficial Finance Co., of New York, Inc.*, 81 F. R. D.

490 (W.D. N.Y. 1979). In fact, there are no Circuit Court opinions that are in conflict with any aspect of the Seventh Circuit's decision in this case.[6]

---

[6] Petitioner's claim that the Seventh Circuit's holding that amendments adding class action allegations relate back under Rule 15(c) conflicts with the Second Circuit's decision in *Arneil* v. *Ramsey*, 550 F.2d 774 (1977) is mistaken.

The issue in *Arneil* was not whether a plaintiff could amend to add class allegations. Instead, the issue was whether the *Arneil* plaintiffs could bring an independent individual suit after the statute of limitations had expired. The convoluted background of the *Arneil* case is as follows: (1) Certain plaintiffs filed a class complaint. The class definition did not include the *Arneil* plaintiffs. (2) That complaint was then amended to enlarge the class, to include people like the *Arneil* plaintiffs. (3) Class certification was subsequently denied. (4) The *Arneil* plaintiffs later filed their independent action, after the statute of limitations had run. To avoid the time bar, they argued (a) that the filing of the amended class complaint tolled the statute of limitations for all class members, including themselves; and (b) that the date of the amended complaint should relate back to the date of the original class complaint. On these facts the *Arneil* court refused to award the *Arneil* plaintiffs the benefit of the extended tolling. In reaching this result, the Second Circuit gave special weight to the fact that the *Arneil* plaintiffs were attempting to bring a separate, independent action, rather than seeking to come into the original suit by way of intervention. 550 F.2d at 783. Given this background, *Arneil* is not in conflict with the Seventh Circuit's decision below.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

JUDSON H. MINER
14 West Erie Street
Chicago, Illinois 60610
Counsel for Respondent

Of Counsel:
DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, Illinois 60611
(312) 751-1170